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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

NO. 73-689

MICHAEL ANTHONY MANESS,
Petitioner

v.

THE HONORABLE JAMES R. MEYERS,
Respondent

On Writ of Certiorari To The 169th Judicial District Court of Bell County, Texas

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Introductory

The above numbered and styled cause was argued before this Court on October 22, 1974.

On or about October 17 or 18, 1974, Petitioner herein filed "Reply Brief for the Petitioner." In said Brief, Petitioner suggested for the first time that review of a trial court's decision as to whether or not to sustain the privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution, can be properly reviewed by refusal to obey the order and then defend such refusal in a contempt hearing or in a hearing gener-

ated by the filing of a Petition for Writ of Habeas Corpus in connection with the citation for contempt. Petitioner cites United States v. Ryan, 402 U.S. 530 (1971), for the contention that refusal of a trial court's order overruling an asserted self-incrimination plea may be appropriately reviewed in a contempt hearing or other proceeding. Petitioner's argument, at least by suggestion, continues that an attorney may counsel the refusal to obey an order which overrules a self-incrimination claim and orders production of records or testimony since an appropriate forum for review of the trial court's order is available.

This argument and contention is without substance and does not decide the question presented to the Court in this cause.

No Formal Contempt Hearing Or A Hearing In A Habeas Corpus Proceeding Can Determine The Efficacy Of Petitioner's Self-incrimination Claim In This Case.

As outlined in the Briefs of both Petitioner and Respondent herein, one McKelva was served with a subpoena duces tecum to bring certain named magazines to the District Court of Bell County, Texas. A Motion to Quash this subpoena on the grounds that the production of the magazines would incriminate the witness McKelva, was overruled by the court. However, McKelva continued in his refusal to produce the magazines on the grounds that they would tend to incriminate him. Then, after a direct order to produce the magazines and a recess to give McKelva time to secure the magazines and

produce them in court, McKelva still persisted in his refusal to produce the subpoenaed documents. The Trial Court then cited McKelva and Petitioner and his co-counsel, Karl Maley, for contempt.

It is clear that any formal hearing on the contempt, if one should have been held, could not have resolved the efficacy of the self-incrimination claim. The magazines would still not have been before the Court for examination by the Judge and an intelligent ruling as to whether the magazines would, in fact, incriminate or tend to incriminate McKelva, could not be made. Likewise, in any habeas corpus proceeding, the magazines would not be before the Court and so no meaningful judicial decision could be reached on the propriety and validity of the claim of self-incrimination.

Moreover, even if a formal contempt hearing or a habeas corpus hearing could develop pertinent facts which would shed light on the efficacy of a self-incrimination claim, such hearings would provide no answer to the interruption of a trial by the assertion of the claim. The trial proper would be over and done with before the self-incrimination privilege is determined to be valid or invalid, and so valuable material testimony would be lost even if the privilege is found to be non-existent.

It would therefore seem clear that the only effective method of determining a self-incrimination assertion is that suggested by the American Law Institute's Model Code of Evidence, Rule 204. That Rule reads as follows:

"Rule 204. Self-Incrimination; Pri-

vilege of Witness.

> Subject to Rules 201, 2-5 to 208 and 231, a witness in an action is entitled under Rule 203 to refuse to disclose a matter, if he claims a privilege so to refuse on the ground that it will incriminate him, and the judge finds that the matter will incriminate the witness." (Emphasis supplied).

The Comment to the Rule states in part as follows:

> "In some of the cases it is intimated that when a witness claims under oath that his answer to a question will incriminate him, his claim must be sustained, because inquiry by the judge as to the possibility of incrimination cannot be made without violating the privilege. It is now generally agreed, however, that the claim of the witness is not conclusive. The question for the judge is whether any answer which the witness might give would disclose incrimination matter as defined in Rule 202." (Emphasis supplied).

It is submitted by Respondent that the adoption of this Rule is the only proper way to test a claimed privilege against self-incrimination and any erroneous decision by the judge compelling disclosure can be remedied by the corrective rules

suggested by Wigmore on Evidence, the McNaughton Revision, Volume VIII, Sec. 2270, pages 417-419, set out at pages 8 and 9 of the Brief for Respondent.

The respectful suggestion is made that, as the law has developed in the jurisdictions of this country, the trial judge can intelligently make decisions on the admissibility of evidence and decisions on certain claims of privilege -- except that, as the law now stands, the court must make a ruling on the privilege against self-incrimination in the dark without any illumination as to the validity or efficacy of the claim. Respondent urges this Court to provide guidance to the courts of the United States of America by holding in this case that a trial court, state or federal, can compel answers or compel the production of documents when self-incrimination is claimed by a witness, so as to properly rule on the privilege.

The Importance Of Deciding Whether A Trial Court May Test A Claimed Privilege Of Self-incrimination By Compelling Answers Or Production Of Documents Is Illustrated By The Grant Of Habeas Corpus Relief In Maley v. Meyers By A Federal District Court.

In Appendix C to the Brief for Petitioner filed herein, the holding of the United States District Court for the Western District of Texas, Waco Division, in Maley v. Meyers is set out.

As the Briefs and the Appendix disclose, Karl A. Maley was also counsel for McKelva and

was found to be in contempt, along with Petitioner here, by the state district judge. Mr. Maley chose, instead of seeking a writ of certiorari in this Court, to go into federal district court asking for habeas corpus relief.

The federal district court did, indeed, issue the writ holding that the order of the State trial court finding Mr. Maley in contempt was unconstitutional because obedience of the subpoena duces tecum by McKelva would require "the irretrieveable surrender of a constitutional right, with no adequate and effective remedies being available for orderly review of the challenged order" and, according that Maley was "fully justified" in advising his client to disobey the order. This decision demonstrates a further step in the wrong direction and invites federal as well as state witnesses to raise non-existent assertions of the privilege against self-incrimination. A definitive decision by this Court is necessary.

Conclusion

In summary, if subpoenaed documents cannot be examined by a trial court and some testimony be compelled (perhaps, both testimony and documents to be reviewed in camera by the court), frivolous claims of self-incrimination will result in the loss of much relevant evidence to litigants, thus severely damaging the judicial, truth-finding process.

Petitioner's contempt conviction should be upheld and this Court is respectfully urged to ground its decision on permitting some inquiry into an as-

sertion of the privilege of self-incrimination by a trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Supplemental Brief of Respondent has been served by placing the same in the United States Mail, postage prepaid, certified, on this the ____ day of November, 1974, addressed as follows: William F. Walsh, 1955 Richmond Avenue, Houston, Texas, 77006; Stuart M. Nelkin, 4635 Southwest Freeway, Houston, Texas, 77027.

LONNY F. ZWIENER
Assistant Attorney General